



8011-01p
SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-70728; File No. SR-NYSE-2013-67)

October 21, 2013

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change Proposing to Amend the Quantitative Continued Listing Standards Applicable to Companies Listed Under Sections 102.01C and 103.01B of the Listed Company Manual

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that, on October 8, 2013, New York Stock Exchange LLC (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to harmonize the quantitative continued listing standards applicable to companies listed under Sections 102.01C and 103.01B of the Listed Company Manual (the “Manual”). Under the proposed amendment, a company will be considered to be below compliance standards if its average global market capitalization over a consecutive 30 trading-day period is less than \$50,000,000 and, at the same time, its total stockholders' equity is less than \$50,000,000. The text of the proposed rule change is available on the Exchange’s website at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to harmonize the quantitative continued listing standards applicable to companies listed under Sections 102.01C and 103.01B of the Manual ("operating companies").

The Exchange's financial initial listing standards for domestic operating companies are set forth in Section 102.01C of the Manual and financial initial listing standards applicable to non-U.S. operating companies are set forth in Section 103.01B of the Manual.³ The Exchange's financial continued listing standards for operating companies are set forth in Section 802.01B of the Manual.⁴ All operating companies are subject to continued listing requirements to maintain (i) a stock price on a 30-trading-day average basis of \$1.00 and (ii) a total market capitalization on a 30-trading day average basis of \$15 million (the "Minimum Listing Criteria"). All listed operating companies are subject to additional financial continued listing requirements which

³ Non-U.S. companies are also permitted to list under the domestic listing standards set forth in Section 102.01C.

⁴ The Exchange also maintains continued listing standards with respect to distribution of shares, set forth in Section 802.01A of the Manual.

vary depending on the initial listing standard in Section 102.01C or 103.01B under which the company originally listed.

The following are the current continued listing standards specific to operating companies listed under the various initial listing standards:

- A company that qualified to list under the Earnings Test set out in Sections 102.01C(I) or 103.01B(I), or pursuant to the requirements set forth under the Assets and Equity Test set forth in Section 102.01C(IV) or the "Initial Listing Standard for Companies Transferring from NYSE Arca" (this standard is no longer in existence and was operative from October 1, 2008 until August 31, 2009), will be considered to be below compliance standards if average global market capitalization over a consecutive 30 trading-day period is less than \$50,000,000 and, at the same time, total stockholders' equity is less than \$50,000,000.
- A company that qualified to list under the Valuation/Revenue with Cash Flow Test set out in Section 102.01C(II)(a) or Section 103.01B(II)(a) will be considered to be below compliance standards if:
 - average global market capitalization over a consecutive 30 trading-day period is less than \$250,000,000 and, at the same time, total revenues are less than \$20,000,000 over the last 12 months (unless the company qualifies as an original listing under one of the other original listing standards); or
 - average global market capitalization over a consecutive 30 trading-day period is less than \$75,000,000.

- A company that qualified to list under the Pure Valuation/Revenue Test set out in Section 102C.01(II)(b) or in Section 103.01B(II)(b) will be considered to be below compliance standards if:
 - average global market capitalization over a consecutive 30 trading-day period is less than \$375,000,000 and, at the same time, total revenues are less than \$15,000,000 over the last 12 months (unless the company qualifies as an original listing under one of the other original listing standards); or
 - average global market capitalization over a consecutive 30 trading-day period is less than \$100,000,000.
- A company that qualified to list under the Affiliated Company Test set out in Section 102C.01(III) or Section 103.01B(III) will be considered to be below compliance standards if:
 - the listed company's parent/affiliated company ceases to control the listed company, or the listed company's parent/affiliated company itself falls below the continued listing standards applicable to the parent/affiliated company, and
 - average global market capitalization over a consecutive 30 trading-day period is less than \$75,000,000 and, at the same time, total stockholders' equity is less than \$75,000,000.

The Exchange proposes to amend the applicable continued listing standards such that every operating company will be subject to the same standards regardless of the standard under which such company initially qualified. The proposed amendment to Section 802.01B of the

Manual will state that an operating company will be considered to be below compliance standards if its average global market capitalization over a consecutive 30 trading-day period is less than \$50,000,000 and, at the same time, its total stockholders' equity is less than \$50,000,000 (the “Proposed Continued Listing Standard”).⁵

Currently, to determine whether an operating company complies with continued listing standards, the Exchange first looks to the financial standard under which the company initially qualified for listing and then applies the continued listing standard specified as applicable to that initial listing standard. The practical impact of this policy is that a company may be deemed noncompliant with the continued listing standard associated with the initial financial listing standard under which it originally qualified to list, notwithstanding the fact that it would have remained in compliance if subject to one of the other continued listing standards. This creates the anomalous result that two companies could have identical quantitative characteristics, yet one company would be deemed noncompliant and the other would remain compliant, purely on the basis of the initial listing standards under which the respective companies qualified to list many years previously. The Exchange believes this potential for disparate treatment is unfair to a listed company and its shareholders in the circumstance that a company is deemed noncompliant or delisted notwithstanding the fact that it would have remained compliant if one of the other continued listing standards was applicable. Moreover, many listed companies evolve subsequent to initial listing, and the idea that a company should be subject indefinitely to continued listing

⁵ Consistent with the Exchange’s general practice in the case of rule changes (unless the amended rule specifies otherwise), upon effectiveness of the proposed amendment, all listed operating companies would be subject to the Proposed Continued Listing Standard rather than any of the other currently applicable continued listing standards, including any company operating under a compliance plan due to an event of non-compliance with a previously applicable continued listing standard or any company awaiting appeal of a delisting determination based on non-compliance with a previously applicable continued listing standard.

criteria tailored to the type of company it was at the time of initial listing no longer seems appropriate.

The Exchange notes that the approach of assigning different quantitative continued listing requirements to companies that originally listed under different listing standards was adopted in 2004, based on the assumption that a company should be subject to a continued listing requirement that was related to the elements in the financial listing standard under which it originally listed.⁶ However, the Exchange's experience administering these standards does not support the original assumption that the disparate standards would enhance the quality of operating companies listed on the Exchange. As discussed below, a review of data collected over more than five years indicates that all of the companies that were delisted under any of the other currently existing continued listing standards during that period would also have been delisted if they had instead been subject to the Proposed Continued Listing Standard, either pursuant to the Proposed Continued Listing Standard itself or pursuant to the Minimum Listing Criteria. Consequently, the Exchange derived no appreciable regulatory benefit during that period from having multiple continued listing standards rather than simply the Proposed Continued Listing Standard and the Minimum Listing Criteria. Therefore, the Exchange does not believe that it is necessary to continue to maintain a complicated set of alternative continued listing standards.

The Exchange acknowledges that the other currently applicable continued listing standards have higher minimum quantitative requirements for average market capitalization than the Proposed Continued Listing Standard. Most notably, the \$50,000,000 minimum average market capitalization requirement of the Proposed Continued Listing Standard is lower than the

⁶ See Securities Exchange Act Release No. 49154 (January 29, 2004), 69 FR 5633 (February 5, 2004) (SR-NYSE-2003-43).

minimum average market capitalization requirements of all of the other currently existing continued listing standards. However, the Exchange believes that, the proposed adoption of the Proposed Continued Listing Standard will not result in any meaningful weakening of the quality of companies listed on the Exchange. In that regard, the Exchange notes that almost all companies that are currently below compliance with their applicable financial continued listing standard will also be below compliance with the Proposed Continued Listing Standard at the time of its adoption. Further, the Exchange notes that more than 87% of the operating companies currently listed on the Exchange are already subject to a continued listing standard identical to the Proposed Continued Listing Standard. For those companies, therefore, there will be no change to their continued listing obligations as a result of the proposed rule change.

With regard to companies that are currently subject to one of the other continued listing standards, the Exchange believes that adoption of the Proposed Continued Listing Standard will not result in the continued listing of a meaningful number of companies that would be subject to delisting under the current continued listing standards. In reaching this conclusion, the Exchange reviewed all companies that were identified as below compliance for any of the financial standards between 2006 and 2012. Approximately 22% of the identified companies during that period were subject to a continued listing standard other than the Proposed Continued Listing Standard. Of those 22% of companies, a majority would have been cited for noncompliance with either the Proposed Continued Listing Standard or the Minimum Listing Criteria.⁷ With respect to the minority of companies that would not have fallen below either the Proposed Continued Listing Standard or the Minimum Listing Criteria, all have regained compliance and

⁷ Of the 22 total companies that make up this percentage, eight would have fallen below the Proposed Continued Listing Standard and an additional four were delisted for falling below the Minimum Listing Criteria. An additional three of the 22 companies voluntarily delisted as a result of merger transactions.

currently continue to be in compliance with the Exchange's quantitative continued listing standards. Based on this empirical data, therefore, the Exchange believes that the Proposed Continued Listing Standard, in combination with the Minimum Listing Criteria, is a rigorous measure that will capture the full universe of companies that are financially unsuitable for listing and will successfully maintain the quality of the Exchange's listing program.

The Exchange believes that the proposed amendment is consistent with Rule 3a51-1(a)(2)(ii) (the "Penny Stock Rule")⁸ under the Act. Section (a)(2) of the Penny Stock Rule provides that a security is not a penny stock for purposes of the rule if it is listed on a national securities exchange that has established quantitative continued listing standards that are reasonably related to certain enumerated initial listing standards and that are consistent with the maintenance of fair and orderly markets. The Penny Stock Rule's minimum initial listing standards are stockholders' equity (\$5,000,000), market value of listed securities (\$50,000,000) or net income (\$750,000). The Proposed Continued Listing Standard requires that a listed company maintain an average global market capitalization over a consecutive 30 trading-day period of in excess of \$50,000,000⁹ and stockholder's equity in excess of \$50,000,000. The Exchange believes that global market capitalization is a comparable measure to the Penny Stock Rule's market value of listed securities requirement. Therefore, the Proposed Continued Listing Standard contains measures that are both related to, and equal to or far in excess of, the Penny Stock Rule's initial listing standards. Therefore, the Exchange believes that the proposed amendment is consistent with the Penny Stock Rule.

⁸ 17 CFR 240.3a51-1.

⁹ For purposes of calculating global market capitalization, the Exchange will only consider securities that are (1) publicly traded (or quoted) or (2) convertible into a publicly traded (or quoted) security.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the “Act”),¹⁰ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹¹ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. In particular, the Exchange believes that the adoption of the Proposed Continued Listing Standard is consistent with the protection of investors and the public interest because: (i) the Exchange has many years of experience utilizing the Proposed Continued Listing Standard as the applicable continued listing standard for a large percentage of listed companies and, in the Exchange’s experience, companies that remain in compliance with that standard are suitable for continued listing; and (ii) the Proposed Continued Listing Standard is unlikely to allow companies to remain listed that would not otherwise be suitable for listing, as the Exchange’s review of historical listing compliance matters indicates that any company that falls below any other applicable quantitative listing standard will generally also fall below the Proposed Continued Listing Standard.

B. Self-Regulatory Organization’s Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed change is being made to rationalize the continued listing standards for operating companies listed on the Exchange. As the Exchange’s research has indicated that this change

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(5).

will be unlikely to have any meaningful effect on the number of companies that will be delisted, the Exchange believes that it will not have any effect on the competition among listing markets and will result in no burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSE-2013-67 on the subject line.

Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2013-67. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer

to File Number SR-NYSE-2013-67 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹²

Kevin M. O'Neill
Deputy Secretary

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¹² 17 CFR 200.30–3(a)(12).